

CHAPTER 177  
FORMERLY  
SENATE BILL NO. 92  
AS AMENDED BY  
HOUSE AMENDMENT NO. 1

AN ACT TO AMEND TITLE 7 OF THE DELAWARE CODE RELATING TO CHRONIC VIOLATOR STATUS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend § 7901(a)(4), Title 7 of the Delaware Code by striking the word “persons” as it appears in said paragraph and substituting in lieu thereof the phrase “regulated parties.”

Section 2. Amend § 7901(b), Title 7 of the Delaware Code by inserting the phrase “, 74A,” immediately after the number “74” in the first sentence of said subsection and by inserting the phrase “, § 8028 of Title 29,” immediately after the phrase "this title" in the first sentence of said subsection.

Section 3. Amend § 7901, Title 7 of the Delaware Code by adding a new subsection to read as follows:

“(c) The purpose of chronic violator status is to provide a mechanism for preventing or correcting circumstances in which: (1) one or more of the traditional enforcement tools and regulatory programs of the Department appear insufficient to conform behavior and deter future violations by the regulated party; or (2) the regulated party appears to be treating penalties and other sanctions as merely an on-going business expense rather than as symptomatic of underlying problems and threats to the State's environment that must be addressed and corrected.”

Section 4. Amend § 7902(a), Title 7 of the Delaware Code by inserting the phrase “, § 8028 of Title 29,” immediately after the phrase "this title" in said subsection.

Section 5. Amend § 7902(a)(1), Title 7 of the Delaware Code by inserting the phrase “provided that, for initial permit applicants that have not been declared chronic violators only, the Department shall have discretion to determine how much of this information to require, based on the likely utility of the information balanced against the burden imposed by requiring it” immediately after the phrase “directors;” as it appears in said paragraph.

Section 6. Amend § 7902(b), Title 7 of the Delaware Code by striking the phrase “persons or entities” as it appears in said subsection and substituting in lieu thereof the phrase “regulated parties”, by striking the word "only" as it appears in said subsection and by inserting the phrase "or other initial request for regulatory authorization within the Department's jurisdiction," immediately after the word "application" as it appears in said subsection.

Section 7. Amend § 7902(b)(2), Title 7 of the Delaware Code by striking the word “Entities” as it appears in said paragraph and substituting in lieu thereof the phrase “Regulated parties.”

Section 8. Amend § 7902(c), Title 7 of the Delaware Code by striking the word “section” as it appears in said subsection and substituting in lieu thereof the word “subchapter” and by adding the following paragraphs at the end of said subsection:

“(6) The term ‘applicant’ shall mean any regulated party who or which has applied for or requested a permit or other regulatory authorization from the Department, or is required to apply for or request a permit or other regulatory authorization from the Department.

(7) The term ‘facility’ shall mean any site or structure regulated by the Department or subject to the Department's regulatory programs.

(8) The term ‘Department’ shall mean the Department of Natural Resources and Environmental Control, the Secretary of the Department of Natural Resources and Environmental Control, or both.

(9) The term ‘regulated party’ shall mean a person subject to the Department's regulatory programs.

(10) The term ‘person’ shall mean any individual, trust, firm, joint stock company, federal agency, partnership, corporation (including a government corporation or authority), limited liability company, business entity, association, state, municipality, commission, political subdivision of a state or any interstate body.

(11) The term ‘regulatory program’ shall mean any program for the conservation and protection of the environment and the State's natural resources, which includes without limitation: a.) those programs established by or acting under 7 Del. C. Chapters 40, 60, 62, 63, 66, 70, 72, 74, 74A, 77, 78, and 91, § 8028 of Title 29, and 16 Del. C. Chapters 63 and 78; b.) the permits, rules, policies and regulations issued under said Chapters; and c.) programs administering delegated federal law under said Chapters.”

Section 9. Amend § 7902, Title 7 of the Delaware Code by adding a new subsection to read as follows:

“(d) Upon request by the Department, the person signing the application and statement, described in subsection (a) of this section, shall provide the Department with information sufficient to enable a positive and accurate identification of such person, including without limitation, driver’s license state and number and date of birth. If the applicant is a business entity, such person shall provide information sufficient to enable a positive identification of the entity, including without limitation, state incorporation information.”

Section 10. Amend § 7903(a), Title 7 of the Delaware Code by striking the number “7902(2)” as it appears in said subsection and substituting in lieu thereof the number “7902.”

Section 11. Amend § 7903(b), Title 7 of the Delaware Code by striking said subsection in its entirety and substituting in lieu thereof the following new subsection: “Notwithstanding subsection (a) of this section, information provided in response to a request from the Department for information to enable a positive and accurate identification of the person signing the application and statement, which is ordinarily understood to constitute private and sensitive personal information, including without limitation, driver’s license state and number and date of birth, shall not be made public or be deemed a public record by the Department except as may be necessary in its investigation and enforcement activities and proceedings. For other information, if the applicant can demonstrate that the information provided pursuant to § 7902 of this title is not a matter of public record at the time of the application, and that the release of such information to the public would constitute an invasion of personal privacy or would seriously affect the applicant’s business or competitive situation, the Department may designate such information as confidential information.”

Section 12. Amend § 7904, Title 7 of the Delaware Code by deleting “.” At the end of the section and inserting the phrase “and chronic violator status.” at the end of the title of said section.

Section 13. Amend § 7904(a), Title 7 of the Delaware Code by striking the said subsection in its entirety and substituting in lieu thereof the following new subsections:

"(a) A chronic violator is a regulated party that has demonstrated an inability or unwillingness to comply with one or more of the Department's regulatory programs.

(1) The criteria for determining whether a regulated party has demonstrated such inability or unwillingness shall include whether the regulated party has engaged in a pattern of willful neglect or reckless disregard of the permits or regulatory programs of the Department.

(2) The Department shall have discretion to commence, review and reconsider, or not, chronic violator status as to any particular regulated party at any time.

(3) Upon consideration of a person’s chronic violator status in accordance with the Chapter, the Secretary may seek a determination of a regulated party’s status as a chronic violator, by commencing a proceeding before the Environmental Appeals Board, by the filing of an administrative complaint. The administrative complaint shall contain the factual and legal basis on which a chronic violator determination is sought, any proposed limits, requirements or restrictions sought to be imposed on a facility or regulated party, as well as any administrative penalties the complaining party seeks to impose under §7906 of this title.

(4) The Environmental Appeals Board, as established by 7 Del. C. § 6007, is granted jurisdiction to hear and determine the issues presented in an administrative complaint from the Secretary on chronic violator status, on such notice as is legally required. The Board shall have discretion in determining the procedures for the hearing process, provided that (a) all parties to the complaint may appear personally or by counsel before the Board; (b) the Board shall provide a reasonable opportunity for discovery of the factual and legal contentions of the parties; (c) all parties to the complaint may produce any competent evidence in their behalf, although the Board may exclude any evidence that is plainly irrelevant, immaterial, insubstantial, cumulative or unduly repetitive, and may limit unduly repetitive proof, rebuttal and cross-examination; (d) the burden is on the complaining party to prove that the regulated party is a chronic violator and that the administrative actions and penalties sought are supported by a preponderance of the evidence before the Board. The Board’s Order on chronic violator status shall contain findings of fact and conclusions of law based on the record, which shall include but not be limited to notices and other underlying procedural documents, a transcript of the hearing, documents entered at the hearing and documents relied upon in deciding chronic violator status. Persons or facilities determined to be chronic violators may appeal the Board’s decision, or any part of its Order, to the Superior Court under § 6009 of this title.

(5) The Department shall adopt, amend, modify, or repeal its regulations, after public hearing, to make them consistent with this subchapter, and the Department may adopt, amend, modify, or repeal regulations at any time, after public

hearing, to effectuate the policy and purposes of this subchapter, including without limitation, to provide a process for determining when a regulated party shall be declared a chronic violator and to set the terms and conditions under which the status of chronic violator may be lifted.

(b) One or more of the factors to be considered in determining whether a regulated party has engaged in a pattern of willful neglect or reckless disregard of the permits or regulatory programs of the Department shall include:

- (1) the nature and extent of the harm caused or threatened;
- (2) the impact on the integrity of regulatory programs;
- (3) duration of noncompliance, including without limitation the duration of the violations and the duration over which violations have continued to occur;
- (4) number of violations of a similar nature;
- (5) total number of violations of all types;
- (6) economic benefit attributable to violations and noncompliance;
- (7) relationship and relevance of violations to activity for which permit is sought;
- (8) the state of mind of the violator;
- (9) the actions of new owners or managers, where ownership or management has changed at the facility;
- (10) actions taken or not taken to prevent, mitigate or respond to harm caused or threatened by the violation;
- (11) whether any or all of the violations were self-reported within 15 consecutive days after the date of discovery;
- (12) the amount of an illegal release of a pollutant in proportion to the amount legally authorized to be released, if any;
- (13) whether the regulated party has adequately capitalized, funded or modernized its operations, maintenance, mechanical integrity efforts, training programs and or risk management reviews so that compliance with the Department's regulatory programs can be reasonably expected;
- (14) whether the regulated party has used recognized and generally accepted good engineering and other related professional practices established within the regulated party's field or industry so that compliance with the Department's regulatory programs can be reasonably expected;
- (15) the size, scope and complexity of operations and the number of facilities located in the state;

(c) In addition, one or more of the types of violations to be considered by the Secretary shall include, but not be limited to:

- (1) violations that cause or threaten harm to the environment or to public health or safety;
- (2) violations resulting in criminal convictions;
- (3) tampering with monitoring or sampling equipment or interfering with samples or analytical results;
- (4) filing false reports or inaccurate or misleading information;
- (5) failing to maintain or use required pollution control equipment, structures or practices;
- (6) repeatedly failing to submit required reports of regulated activity such as Discharge Monitoring Reports;
- (7) repeatedly conducting a regulated activity without a required permit or other authorization;
- (8) The extent of deviation from the permit, order, or other requirement;
- (9) noncompliance with Court Orders including without limitation Consent Orders;
- (10) alleged violations that were the subject of negotiated settlements notwithstanding any general release of liability and whether such violations have been found or proved in concurrent or subsequent proceeding or public hearings; and
- (11) violations and conduct by related persons, business entities and other regulated parties including without limitation conduct and violations by common employees, managers, officers, directors, shareholders, principals, partners, and owners.”

Section 14. Amend § 7904, Title 7 of the Delaware Code by deleting subsection “(b)” therein and by re-designating current subsection “(c)” as a new subsection “(d)”.

Section 15. Amend the re-designated § 7904(d), Title 7 of the Delaware Code by inserting the phrase “or institute procedures” immediately after the phrase “promulgate regulations” in the last sentence of said subsection.

Section 16. Amend § 7905, Title 7 of the Delaware Code by inserting the phrase “, regulated parties” immediately after the phrase “All applicants” in the first sentence of said section.

Section 17. Amend § 7906, Title 7 of the Delaware Code by striking the said section in its entirety and substituting in lieu thereof the following new section:

“In addition to other applicable enforcement provisions contained in relevant sections of chapters covered by § 7901(b) of this subchapter, the Secretary is authorized to impose an administrative penalty of up to \$10,000 per day for each violation against any regulated party that is determined to be a chronic violator in accordance with the provisions of § 7904(a) of this subchapter, provided that simultaneous violations of more than 1 pollutant or air contaminant parameter or of any other limitation or standard may be treated as separately punishable violations within each day, and multiple, intermittent violations of a single pollutant or air contaminant parameter or any other limitation or standard may be treated as separately punishable violations within each day. Any administrative penalties collected by the Department under this section are hereby appropriated pursuant and subject to the procedures and requirement of 7 Del. C. § 6005(d).”

Section 18. Amend § 6005(e), Title 7 of the Delaware Code by inserting the phrase “Penalties or” immediately before the word “Fines” in the first sentence of said subsection, and by inserting the phrase “penalty or” immediately before the word “fine” at the end of the first sentence of said subsection.

Approved August 16, 2011